UPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ——
906

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THRIFT DRUG COMPANY OF PENNSYLVANIA,

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Thrift Drug Company of Pennsylvania, Petitioner herein, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 11, 1968, granting enforcement of an order issued against Petitioner by the National Labor Relations Board.

On December 16, 1968, this Court granted certiorari in Case Nos. 573, 585 and 691.[1] The pivotal issue in these cases is the reliability of union authorization cards. The same issue is present in the instant matter. In addition, this case presents important closely related subsidiary issues. It therefore provides an appropriate vehicle for a thorough consideration by this Court of the law pertaining

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[1] *NLRB* v. *Gissel Packing Co., Inc.* (Case No. 573); *The Sinclair Co.* v. *NLRB* (Case No. 585); and *Local No. 347, Food Store Employees Union* v. *NLRB* (Case No. 691).

to the use of authorization cards as a basis for certifying unions.[2]

Opinions Below

The opinion of the Court of Appeals has not yet been officially reported. It is annexed as Appendix A, pp. 1a-6a. The findings of fact, conclusions of law and order of the National Labor Relations Board are reported at 167 NLRB No. 57 (Appendix B, pp. 7a-49a).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(e).

Questions Presented

1. Where an employer refuses a union's offer to prove that a majority of employees signed authorization cards on the ground that in its experience a card check is unreliable because it would not reveal whether employees had signed cards as a result of misrepresentation as to the purpose of the card, and the employees subsequently reject union representation in an election, is the National Labor Relations Board nevertheless lawfully entitled to certify the union based upon such cards?

2. Should authorization cards be counted in determining a union's majority, and as a basis for a bargaining order, where the solicitor told one employee that the card was an 'election card', and stated to four additional employees that they were under no obligation by signing the cards?

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[2] Should this Court grant certiorari herein, Petitioner will file its Brief within a shorter period of time than provided in this Court's Rules, in order to facilitate the review of this case at the same time as this Court reviews Case Nos. 573, 585 and 691.

3. Should authorization cards be admitted in evidence in the absence of testimony from the signer or a witness to their execution?

4. May an employer's good faith doubt of a union's majority status at the time the union demands recognition be negated solely on the basis of unfair labor practices committed subsequent to the demand?

5. Does it effectuate the policies of the Act to issue a bargaining order in every case where an employer unlawfully refuses to recognize a majority union?

Statutes Involved

The National Labor Relations Act, as amended (61 Stat. 136; 72 Stat. 945; 73 Stat. 544; 29 U.S.C. § 141 *et seq.*), insofar as is here pertinent, provides:

Section 7:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a):

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

• • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Section 9(c):

"(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Section 10(b):

"* * * Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States. . . ."

Section 10(e):

"* * * The finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

Statement of the Case

Thrift Drug Company of Pennsylvania, hereinafter referred to as the "Petitioner", is a Pennsylvania corporation having its principal office in Pittsburgh, Pennsylvania.

In May, 1966, the Retail Clerk's Union, Local 526, Retail Clerks' International Association, hereinafter referred to as the "Union," began organizing the employees of Petitioner's store in Kenosha, Wisconsin.

The Union's organizer testified that he advised one employee whose signature he solicited that she would be signing "an election card" which "would not obligate her in any way." When asked what he explained to this employee, he responded "only the election is as far as I went."

The organizer also testified that in obtaining cards from four additional employees he advised them that they would not be under any obligation by signing the cards.

After approximately four months of such solicitation, the Union signed up ten (10) of the sixteen (16) employees in the unit.

On August 24, 1966, by mail, the Union requested recognition as the bargaining representative for all of the employees.

Petitioner, through its counsel, responded to the Union by letter on August 29, stating in part:

> "Furthermore, your offer of a card check is not a suitable way to attempt to resolve the company's doubt of your claim of majority status. A mechanical check of alleged signatures would in no way indicate whether an employee had signed a card under coercion or because of misrepresentation as to the purpose of the card. Our office knows, and you do, too, of many situ-

ations where cards signed under the above circumstances have been held to be invalid. A mechanical card check would not reveal such shortcomings. We are in agreement with you that the questions raised by your letters and petition can best be resolved under the auspices of the National Labor Relations Board in a secret ballot election among the employees of the company."

On August 30, Petitioner received a notice of representation hearing from the Board. On September 19, the parties entered into a Stipulation for Certification Upon Consent Election which was approved by the Regional Director of the Board. On September 21, the Union filed unfair labor practice charges, alleging that Petitioner had violated Section 8(a)(1) of the Act. On October 12, the election was held. Out of fifteen (15) eligible votes cast in the election, seven (7) votes were for the Union, and eight (8) were against representation.

On October 18, the Union filed objections to conduct affecting the results of the election and an amended charge. A complaint was issued by the Board on November 15. The case was heard on December 12 and 13, 1966, in Kenosha, Wisconsin.

Decision of the Trial Examiner

The decision of the Trial Examiner, rendered on May 30, 1967, found that Petitioner had committed various acts of interference and restraint in violation of Section 8(a)(1) of the Act. He further found that the Union represented a majority of the employees based upon authorization cards and that the Petitioner's refusal to recognize the Union was in violation of Section 8(a)(5) of the Act. He

therefore recommended that the election be set aside, the representation petition be dismissed, and that Petitioner commence bargaining with the Union.

Decision of the Board

On September 15, 1967, the Board issued its Decision and Order affirming and adopting the findings, conclusions and recommendations of the Trial Examiner. Petitioner filed a petition for review with the Court of Appeals for the Sixth Circuit on October 2, 1967.

Decision of the Court of Appeals

On December 11, 1968, the Court of Appeals rendered its decision enforcing in full the Board's Order.

Reason for Granting Review

This Court has already granted certiorari to resolve a conflict between the circuits concerning the reliability of authorization cards in determining a union's majority status. If certiorari is granted herein, this Court can resolve additional conflicts concerning other aspects of the same question.

POINT I

This Court Is Presently Reviewing the Identical Issue Involved in This Case.

The issue in *NLRB* v. *Sinclair Co.*, 397 F. 2d 157 (1st Cir. 1967), *cert. granted* December 16, 1968, is identical to the primary issue in the instant matter. In *Sinclair*, the Court of Appeals for the First Circuit relied upon authorization cards as a basis for enforcing a bargaining order. The *Sinclair* decision is in conflict with the holding of the Fourth Circuit in *NLRB* v. *Gissel Packing Co.*, 398 F. 2d 336 (4th Cir. 1968), *cert. granted* December 16, 1968. In *Gissel*, the Court stated:

> "In recent cases we have had occasion to point out that authorization cards are such unreliable indicators of the desires of the employees that an employer confronted with a demand for recognition based solely upon them is justified in withholding recognition pending the result of a certification election." 398 F. 2d at 337.

The decision of the Court of Appeals for the Sixth Circuit in the instant matter is similarly in conflict with the *Gissel* decision and the decision on which it was based, *NLRB* v. *S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir.

1967). This conflict between the circuits was succinctly stated by the court below:

> "Appellant cites and relied on the Fourth Circuit view of NLRB bargaining orders expressed in *NLRB* v. *S.S. Logan Packing Co.*, 386 F. 2d 562 (4th Cir. 1967). This court has, however, considered and rejected the *Logan* holding. *NLRB* v. *Atco-Surgical Supports, Inc.*, 394 F. 2d 659 (6th Cir. 1968)." (Appendix A, p. 6a).

It therefore would be appropriate to consider this matter along with the *Gissel* and *Sinclair* cases.[3]

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[3] In *Gissel* and *Sinclair* the most significant issue presented is whether the NLRB may certify a union based upon authorization cards. The resolution of this issue will depend in large part on an interpretation of the Act and its legislative history. In *Gissel*, counsel for the Union has indicated in its Petition for a Writ of Certiorari that legislative history supports an interpretation of the Act that the Board may use authorization cards as a basis for bargaining orders. There is no indication that any other party will present a contrary interpretation.

In its Brief to the Court of Appeals for the Sixth Circuit, Petitioner argued that the Board is restricted to the use of secret ballots for the resolution of representation questions. Petitioner cited legislative history and misinterpretation of this Court's decision in *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944), in support of its argument. Petitioner submits that this discussion would be beneficial to this Court in resolving the conflict between the circuits concerning the reliability of authorization cards. ***The pertinent part of its Brief is attached hereto as Appendix C, pp. 50a-64a.***

POINT II

Assuming That This Court Holds That Authorization Cards May Be Used as a Basis for Certifying a Union, Certiorari Should Be Granted in Order to Resolve a Sharp Conflict Within the Circuits With Respect to the Rule to Be Followed Where There Is Evidence of Misrepresentation as to the Purpose of the Cards.

A. *By Adhering To Its Cumberland Shoe Rule The Court Below Refused To Invalidate Authorization Cards Obtained Through Misrepresentation.*

The most significant issue to be decided by this Court in *Sinclair* and *Gissel* is whether the National Labor Relations Board may certify a union based upon authorization cards. Inextricably related to this question is another, equally troublesome: Does a misrepresentation by the solicitor as to the card's purpose invalidate the card?

The National Labor Relations Board has advised this Court that unions have in fact engaged in such misrepresentation. In its Petition for a Writ of Certiorari in *Gissel*, the Board states:

> "Although there have been abuses in the unions' use of authorization cards—primarily misrepresentations as to whether by signing the cards the employees were designating the union as their representative or merely authorizing it to seek an election to determine that issue—it does not follow that such cards are inherently unreliable." (p. 19).

Counsel for Petitioner agrees with the Board that there have been abuses in the use of authorization cards and have explicated their views in legal periodicals.[4]

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[4] See Robert Lewis, "The Use and Abuse of Authorization Cards in Determining Union Majority," 16 Lab. L.J. 434 (July, 1965);

Inasmuch as this question is not presently before the Court,[5] we submit that this case presents a most appropriate vehicle to resolve the conflict between the circuits, as discussed below. It presents the issue squarely.

The Union representative unequivocally testified that he advised the employee whose signature he solicited that she would be signing "an election card" which "would not obligate her in any way." When asked what he explained to this employee, he responded "only the election is as far as I went." (App. 73a, Record in Court of Appeals). The Board counted this card, and others similarly obtained, towards determining the Union's majority. The court below affirmed, in reliance on its *"Cumberland* rule."[6] (Appendix A, pp. 3a-4a).

The Sixth Circuit's *Cumberland* rule holds that union authorization cards will be invalidated on the grounds of misrepresentation in only one situation: where the solicitor's words "create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election." NLRB* v. *Swan Super Cleaners, Inc.,* 384 F. 2d 609, 618 (6th Cir. 1967) (emphasis in original).

Accordingly, since the solicitor in the instant matter did not represent that an election was the "only purpose" of the card, the court below, relying on its *"Cumberland* rule",

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Robert Lewis, "NLRB Again Stretches Joy Silk's Tenuous Fabric," 18 Lab. L.J. 222 (April, 1967); and William Krupman, "The Joy Silk Rule—The Courts Weave A New Fabric," 19 Lab. L.J. 603 (October, 1968).

[5] In its Petition for a Writ of Certiorari in *Gissel,* the Board states:

> "The standard by which the Board determines the validity of challenged cards . . . is not at issue in the present cases." (at pp. 20-21, n. 20).

[6] *NLRB* v. *Cumberland Shoe Corp.,* 351 F. 2d 917 (6th Cir. 1965).

upheld the Board's finding that the Union represented a majority of the employees.

A different result would have been reached in the circuits which do not follow *Cumberland.*

B. *The Decision Below Conflicts With Decisions In The 2nd, 4th, 5th, 7th and 8th Circuits Regarding The Rule To Be Followed Where Cards Have Been Obtained Through Misrepresentation.*

The Sixth Circuit's Cumberland rule has been rejected by five other circuits.

The *Second Circuit's* rejection of the rule of the Sixth Circuit was expressed in *Bryant Chucking Grinder Company* v. *NLRB,* 389 F. 2d 565 (2nd Cir. 1967), *cert. denied* 392 U.S. 908. Referring to an earlier decision,[7] Judge Friendly, in his concurring opinion, stated:

> "*. . . we rejected the rule announced by the Board in Cumberland Shoe Corp.,* 144 N.L.R.B. 1268 (1963), enforced 351 F. 2d 917 (6th Cir. 1965), that an authorization card 'clear' on its face could be invalidated for misrepresentation as to its purpose only by proof that the solicitor had said that the 'sole' purpose of the card was to secure an NLRB conducted election; we held that cards were invalid if 'signers were induced to affix their signatures by statements causing them to believe that the union would not achieve representative status without an election.'" 389 F. 2d at 569 (emphasis added).

The *Fourth Circuit* repudiated the *Cumberland Shoe* rule in *Crawford Mfg. Co.* v. *NLRB,* 386 F. 2d 367 (4th Cir. 1967), *cert. denied* 390 U.S. 1028:

> "Despite the regard we hold for the contrary opinion, e.g., NLRB v. Cumberland Shoe Corp., 351 F. 2d 917,

[7] *NLRB* v. *S. E. Nichols Co.,* 380 F. 2d 438 (2nd Cir. 1967).

920 (6th Cir. 1965) and cases there cited, we will not stick mechanically to the literal phrasing of the cards. A ghost of the parol evidence rule, such literalism subordinates what really counts: the actual understanding of the signers." 386 F. 2d at 372.

The *Fifth Circuit* rejected *Cumberland Shoe* in *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F. 2d 482 (5th Cir. 1967):

"The Trial Examiner and the Board rely on Cumberland Shoe Corp., 144 N.L.R.B. 1268 and Aero Corp., 149 N.L.R.B. 1283 (1965) for the rule that if such cards as these are solicited by a statement that they are to be used to get an election, but are later used to prove majority status, there is no misrepresentation. According to the Board, it would require a statement that the cards were to be used *only* to get an election to constitute misrepresentation.

This Court has previously shown its impatience with such contentions." 376 F. 2d at 486 (emphasis in original).

The *Seventh Circuit* in *NLRB* v. *Dan Howard Mfg. Co.*, 390 F. 2d 304 (7th Cir. 1968), and the *Eighth Circuit* in *Bauer Welding and Metal Fabricators, Inc.* v. *NLRB*, 358 F. 2d 766 (8th Cir. 1966), have refused to follow the Board's rule as enforced by the Sixth Circuit.[8]

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[8] The First Circuit has apparently lined up with the 2nd, 4th, 5th, 7th and 8th Circuits in disapproving the *Cumberland Shoe* rule. In *NLRB* v. *Sandy's Stores, Inc.*, 398 F. 2d 268, 271 (1st Cir. 1968), the court stated:

"Moreover, affirmation of the card authorization findings would require reliance in the most mechanical sense on the *Cumberland* rule, an approach rejected by a number of other circuits and, we think, not necessarily commanded in the instant case by our own remarks in NLRB v. Southbridge Sheet Metal Works, Inc., 380 F. 2d 851 (1st Cir. 1967)."

C. *The Decision Below Is Consistent With The Rule Of The District Of Columbia And The Tenth Circuits.*

The United States Court of Appeals for the District of Columbia in *U.A.W.* v. *NLRB (Preston Products)*, 392 F. 2d 801 (D.C. Cir. 1967), *cert. denied* October, 1968 (Case No. 160), held:

> "This court has consistently upheld the rule, announced by the Board in N.L.R.B. v. Cumberland Shoe Corp., 144 NLRB 1268 (1963), *enforced*, 6 Cir., 351 F. 2d 917 (1965), that where the cards are unambiguous on their face, unless employees were told that an election was the *only* purpose of the cards, the employees would be held to the terms of the cards which they had signed." 392 F. 2d at 807 (emphasis in original).

Accord: Furr's Inc. v. *NLRB*, 381 F. 2d 562 (10th Cir. 1967).

D. *Uniformity Of Interpretation Of National Labor Policy Is Desirable.*

The Sixth and Tenth Circuits, and the District of Columbia Circuit, have one rule concerning misrepresentation. The Second, Fourth, Fifth, Seventh, Eighth and, apparently the First Circuits, have another rule. The resolution of this continuing and ever-increasing conflict would be beneficial. The continued existence of different rules on this important issue in labor-management relations impairs the uniformity of national labor policy that the Act was designed to achieve.[9] *Cf.*, *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 490-91.

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[9] Resolution of this conflict between the circuits would also lessen the likelihood of "undersirable 'circuit shopping'." *Automobile Workers* v. *Scofield*, 382 U.S. 205, 212-13 and 222, n. 20.

POINT III

The Decision of the Court Below Is in Conflict With Decisions of the 7th and 8th Circuits With Respect to the Applicable Rules of Evidence and Procedure to Be Followed in Determining the Authenticity of Authorization Cards.

The Petitioner argued before the court below that two of the Union's ten authorization cards should not be counted in determining the Union's majority. Petitioner submitted that the two cards were not properly authenticated because:

(1) The card signers did not testify, and
(2) The person who authenticated the cards was not a witness to the signing.

The Trial Examiner, upheld by the Board, found:

"I merely restate the obvious, for emphasis, by pointing out that Crowe did not testify that the cards were signed in her presence, or that they had come into her possession in connection with her duties as a steward for the Union.

* * *

Of course, it was unnecessary for the Respondent to put forth any effort to help the General Counsel prove his case, and the question as to whether I was right in receiving General Counsel's Exhibits 9 and 10 is whether the General Counsel's submission, through Crowe's testimony, established a *prima facie* case." (Appendix B, pp. 21a-22a).

* * *

"On the basis of the thin and barely adequate identification by Crowe that she recognized the signatures

> on General Counsel's Exhibits 9 and 10 as being those of Hix and McClelland, I affirm my ruling admitting those exhibits in evidence, and find that the purported signatures are genuine, and the authorization cards valid." (Appendix B, p. 26a).

General Counsel's method of authentication was to call upon a complete stranger to verify the signatures. The Trial Examiner and the Board approved this procedure. The court below did not specifically pass on this issue.[10] However, by refusing to invalidate the cards, it impliedly affirmed the method used to authenticate them. Thus, the Sixth Circuit placed itself in conflict with the decisions of the Seventh and Eighth Circuits.

The rule of the Seventh and Eighth Circuits is that authorization cards must be signed in the presence of the witness who seeks to authenticate them.

In *NLRB* v. *Economy Food Center,* 333 F. 2d 468 (7th Cir. 1964), the court stated:

> "The signatures on the cards of the two employees absent at the time of the hearing were authenticated by Union representative Goss, who testified that both cards were signed in his presence and that he witnessed each signature." 333 F. 2d at 471.

The Eighth Circuit similarly held in *Colson Corp.* v. *NLRB,* 347 F. 2d 128 (8th Cir. 1965), *cert. denied* 382 U.S. 904, that for the purpose of authenticating authori-

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[10] The court below did not resolve this issue because in its opinion "the two cards would not eliminate the union's majority status." Appendix A, pp. 3a-4a, n. 3. However, these two cards would be determinative of the union's majority status if even one additional card was obtained through misrepresentation. (See Point II, *supra*).

zation cards the witness must have been present when the card was signed:

> "Petitioner argues that each employee who signed a card should have personally authenticated his own signature. The law permits alternative methods of authentication. *Thus the courts have approved the authentication of such cards by a witness to their execution,* N.L.R.B. v. Economy Food Center, 7 Cir. 1964, 333 F. 2d 468, 471, or by comparison with a known specimen of the person's handwriting, N.L.R.B. v. Philamon Laboratories, 2 Cir. 1962, 298 F. 2d 176, 179-180, certiorari denied, 370 U.S. 919, 82 S. Ct. 1555, 8 L. Ed. 2d 498." 347 F. 2d at 134 (emphasis added).

The manner by which authorization cards are authenticated will often be determinative of the card's reliability. The proper method of authentication should therefore be resolved by this Court.[11]

POINT IV

Certiorari Should Be Granted to Resolve a Conflict in the Circuits as to Whether an Employer's Good Faith Doubt of a Union's Majority Can Be Negated by Subsequent Unfair Labor Practices.

The Trial Examiner and the Board resolved the question of whether the Petitioner had a good faith doubt of the Union's majority solely on the basis of unfair labor practices committed subsequent to the Union's demand for

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[11] This Court may desire to pass upon the applicability of Section 10(b) to the proper method of authentication. As noted by the court below, (Appendix A, pp. 3a-4a, n. 3), varied interpretations have been placed on this section in different circuits. Cf. *NLRB* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758 (6th Cir. 1964).

recognition. Referring to the Petitioner's reasons for rejecting the Union's demand for recognition, the Trial Examiner stated:

> "The assertions might, in other circumstances, have established a good faith doubt, but here their force has been effectively blunted by its aggravated conduct in coercing and intimidating its employees. . . ." (Appendix B, pp. 37a-38a).

The court below held that:

> "The Trial Examiner and the Board had ample reason to conclude that Petitioner's course of conduct represented rejection of collective bargaining rather than a good faith doubt of the Union's majority status." (Appendix A, p. 6a).

This holding is in conflict with the decisions of the Second Circuit. The Second Circuit does not rely on evidence of a company's "course of conduct" subsequent to a request for recognition to determine whether the company acted in bad faith at the time it refused recognition.

In *NLRB* v. *River Togs, Inc.*, 382 F. 2d 198 (2nd Cir. 1967), the court stated:

> ". . . we see no logical basis for the view that substantial evidence of good faith doubt is negated solely by an employer's desire to thwart unionization whether by proper or even by improper means." 382 F. 2d at 206-07.

In *Textile Workers Union* v. *NLRB*, 386 F. 2d 790 (2nd Cir. 1967), the court reaffirmed this doctrine:

> "The use of (a) campaign speech as evidence to infer bad faith at an earlier time is a hazardous business

as we pointed out in NLRB v. River Togs, Inc., supra, 382 F. 2d at 206-207; since votes may be gained or lost during a campaign, presenting anti-union arguments affords no logical basis for belief that the employer did not doubt the card majority." 386 F. 2d at 794.

If certiorari were granted herein, this conflict between the Sixth and the Second Circuits could be resolved.

POINT V

Certiorari Should Be Granted to Determine Whether the Policies of the Act Are Effectuated by the Issuance of a Bargaining Order in Every Case in Which an Employer Unlawfully Refuses to Recognize a Majority Union.

Almost immediately after the election seven of the ten employees who signed authorization cards voluntarily terminated their employment. (Appendix B, p. 38a). Petitioner argued before the Board and the court below that a bargaining order therefore was not justified because it was an inappropriate remedy under the facts of this case. (Appendix A, p. 3a).

The Board automatically adopted the Trial Examiner's recommended order that Petitioner bargain with the Union. The court below enforced the Board's order. It did not consider whether the facts of this case warranted a different conclusion. (Appendix A, p. 62).

The Second Circuit would have made such an inquiry. In *NLRB v. World Carpets of New York, Inc.*, —— F. 2d ——, 69 LRRM 2681 (2nd Cir. November 8, 1968) the court stated:

"On the other hand, if, on the remand we are directing, the Board should find the facts in a sense favorable to the General Counsel, it should not proceed immediately to the issuance of a bargaining order but should consider whether such an order in this case will further the policies of the National Labor Relations Act, notably 'to provide orderly and peaceful procedures for preventing the interference' by employees and employers 'with the legitimate rights of the other.' § 1(b). Cf. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 193-97, 8 LRRM 439 (1941). As said in NLRB v. Flomatic Corp., 347 F.2d 74, 78, 59 LRRM 2535 (2 Cir. 1965), a bargaining order is 'strong medicine' whose 'potentially adverse effects on the employees' § 7 rights must not be overlooked.' While, despite the contrary ruling of another circuit, NLRB v. S .S. Logan Packing Co., 386 F.2d 562, 66 LRRM 2596 (4 Cir. 1967), we continue to hold that a union validly authorized by a majority of the employees in an appropriate unit is generally entitled to recognition without having to submit to a Board-supervised election, the Board should not automatically issue a bargaining order in every such case without considering whether the policies of the Act will be effectuated thereby. 'The Act does not create rights for individuals,' or for unions, 'which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace.' Phelps Dodge Corp. v. NLRB, *supra*, 313 U.S. at 194, 8 LRRM 439." 69 LRRM at 2684.

To the same effect, *NLRB* v. *Pembeck Oil Corp.*, —— F.2d ——, 69 LRRM 2811 (2nd Cir. November 27, 1968).

If certiorari were granted herein, this Court could determine whether the policies of the Act effectuate the issuance of a bargaining order in every case.

CONCLUSION

It is respectfully requested that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit and thereby resolve significant conflicts in the circuits concerning the broad and frequently litigated subject of authorization cards.

Respectfully submitted,

.....

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Dated: December 31, 1968.

APPENDIX

APPENDIX A

Opinion of the Court of Appeals for the Sixth Circuit

FILED
DEC 11 1968
CARL W. REUSS, Clerk

No. 18216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION for Review of an Order of the National Labor Relations Board.

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Decided December 11, 1968.

Before: O'SULLIVAN, EDWARDS and MCCREE, Circuit Judges.

EDWARDS, Circuit Judge. Petitioner in this case seeks to set aside the findings and the bargaining order entered by the National Labor Relations Board, and the Board in turn seeks enforcement of its order. The conclusions of law, as set forth in the Trial Examiner's decision and as adopted by the Board, are as follows:

"1. All employees at Respondent's Kenosha, Wisconsin, store, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards, and supervisors as defined in the Act,[1] constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

"2. At all times since August 24, 1966, the Union[2] has been the duly designated bargaining representative of the aforesaid collective-bargaining unit.

"3. The Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1), by threatening them that the Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts, by promising them wage increases and other benefits, by coercively interrogating them as to how they were going to vote, or if they had attended union meetings, by intimidating them through its orders to reject applications for employment from prounion applicants, and by telling them that their attendance at union meetings had been observed and noted.

"4. By failing and refusing on August 26, 1966, and at all times thereafter, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the aforesaid unit, and by unilaterally changing the wages of employees in October 1966, without notice to or consultation with the Union, the

[1] National Labor Relations Act, 29 U.S.C. §§ 151-168 (1964).

[2] Retail Clerks International Association, Local 526, AFL-CIO.

Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act.

"5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act."

Petitioner does not contest the section 8(a)(1) violation findings in this proceeding. It also concedes the fifth of the conclusions above, reserving most of its argument for three contentions:

1. The bargaining order was not justified because in fact the union never had a valid card majority.

2. The bargaining order was not justified because petitioner had a good faith doubt of the union's majority.

3. The bargaining order was not justified because under the facts of this case it was an inappropriate remedy.

The Board found that the union had ten authorization cards out of an appropriate bargaining unit of fifteen when it made its demand for bargaining rights on August 24, 1966. Petitioner's primary argument attacking this majority is that a number of cards should be held to be invalid because of solicitor misrepresentations.[3] In this re-

[3] Two of these cards are also challenged by petitioner on the ground that the witness who testified she "recognized" the signatures had not been properly qualified to so testify. The statute under which NLRB hearings are authorized provides in part: "Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure. . . ." 29 U.S.C. § 160(b) (1964). Some courts looking at the "so far as practicable" language have held that "the Board is not required to observe the legal rules of evidence as are com-

gard petitioner relies upon this court's holding in *NLRB v. Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967):

> "We think it right now to say that we do not consider that we have announced a rule that only where the solicitor of a card actually employs the specified words 'this card is for the *sole* and *only* purpose of having an election' will a card be invalidated. We did not intend such a narrow and mechanical rule. We believe that whatever the style or actual words of the solicitation, if it is clearly calculated to create in the mind of the one solicited a belief that the *only purpose of the card is to obtain an election,* an invalidation of such card does not offend our *Cumberland* rule [*NLRB v. Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965)]." *Id.* at 618. (Emphasis in original.)

In our instant case there is no claim that the cards themselves contained any ambiguity or misrepresentation. We have examined the claimed misrepresentations of the solicitors. Taking into account our court's limited function in review of NLRB findings of fact and inferences based thereon, we do not find any language which compelled the Board to hold that a particular solicitor was seeking to convey "a belief that the *only purpose of the card is to obtain an election.*"

We now turn to appellant's second and third substantial contentions pertaining to "good faith doubt" and "inap-

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mon law courts." *NLRB v. W. J. Jones Lumber Co.*, 245 F.2d 388 (9th Cir. 1957). *See also Sardis Luggage Co. v. NLRB*, 234 F.2d 190 (5th Cir. 1956). However, in view of the fact that the two cards would not eliminate the union's majority status, we do not find it necessary to pass on petitioner's contention that the Trial Examiner's receipt of them in evidence was error.

propriate remedy." These we believe to be closely related and hence they will be considered together.

This record shows that close on the heels of the union's August 24, 1966, bargaining demand (and even before its refusal by petitioner), one of the petitioner's employees heard the store manager say: "I don't know what's the matter with these girls. They won't believe me when I tell them they're going to close the store, if the union gets in, and we'll all be out of a job." This same witness also testified to another conversation with this same store manager shortly before the NLRB election:

> "Well, he asked me did I hear — he said, 'You know, the election is October 12th.' And I said, yes, I did. And he said, 'Well, maybe you'd like to come in and work for a couple of hours on the 12th,' because that was my day off. And he said, 'You have to be in the store to vote.' And I said, 'Well, don't worry, I'll come in to vote.' And he said, 'Well, I thought you might like to get some time in before the 12th, because if the union gets in you're not going to get any time in after the 13th.' "

The record is replete with similar testimony from other witnesses. It also contains support for the Trial Examiner's finding of promises of wage increases. One witness testified that midway in the election campaign the store manager told three employees: "I'm planning to give you a raise in October, or see you get a raise in October, if the union doesn't come in, and I'm thinking of a dollar and a half."

All in all, the course of conduct shown on the part of petitioner immediately after receipt of the union's demand

for bargaining rights was that of an employer determined to defeat unionization regardless of the wishes of the employees and completely without regard to the law. The violation of the NLRA found in this case can by no means be characterized as "borderline" section 8(a)(1) violations as in *NLRB* v. *Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968), or as 8(a)(1) violations "without more" as in *Lane Drug Co.* v. *NLRB*, 391 F.2d 812 (6th Cir. 1968). Indeed, it seems remarkable on this record that the union lost the election by the close vote of seven votes for the union to eight against. The Trial Examiner and the Board had ample reason to conclude that petitioner's course of conduct represented rejection of collective bargaining rather than a good faith doubt of the union's majority status.

Under the factual circumstances of this case, we believe that the findings and conclusions of the Board have substantial support in this whole record. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

Enforcement of the bargaining order may well be the only way to remedy the illegal course of conduct deliberately chosen by petitioner. *NLRB* v. *Winn-Dixie Stores, Inc.*, 341 F.2d 750 (6th Cir.), *cert. denied*, 382 U.S. 830 (1965); *NLRB* v. *Cumberland Shoe Corp.*, 351 F.2d 917 (6th Cir. 1965); *NLRB* v. *Delight Bakery, Inc.*, 353 F.2d 344 (6th Cir. 1965).

Appellant cites and relies on the Fourth Circuit view on NLRB bargaining orders expressed in *NLRB* v. *S. S. Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967). This court has, however, considered and rejected the *Logan* holding. *NLRB* v. *Atco-Surgical Supports, Inc.*, 394 F.2d 659 (6th Cir. 1968).

Enforcement of the Board's order is granted.

APPENDIX B

Decisions and Orders of the National Labor Relations Board and Trial Examiner

DECISION OF THE NATIONAL LABOR RELATIONS BOARD

On May 24, 1967, Trial Examiner Milton Janus issued his Decision in the above-entitled proceedings, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that such allegations be dismissed. The Trial Examiner further recommended that the election held in Case No. 30-RC-508 be set aside and the petition filed therein be dismissed. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs; the Respondent filed an answering brief to the exceptions of the Charging Party, and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are herby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

Decisions and Orders of the National Labor Relations Board and Trial Examiner

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that the Respondent, Thrift Drug Company of Pennsylvania, Kenosha, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D.C. September 15, 1967.

.....

Frank W. McCulloch, Chairman

.....

John H. Fanning, Member

.....

Sam Zagoria, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] Delete from paragraph 2(b) of the Trial Examiner's Recommended Order that part thereof which reads "to be furnished" and substitute therefor "on forms provided. . . ."

Decisions and Orders of the National Labor Relations Board and Trial Examiner

TRIAL EXAMINER'S DECISION

Statement of the Case

MILTON JANUS, Trial Examiner: These cases, involving unfair labor practice charges and objections to conduct affecting the results of an election, were heard at Kenosha, Wisconsin, on December 12 and 13, 1966, pursuant to a complaint issued on November 15, 1966, and upon a report on objections issued the same date. The two cases were consolidated for hearing. The complaint, against Thrift Drug Company of Pennsylvania, herein called the Respondent or the Company, alleges violations of Section 8(a)(1) and (5) of the National Labor Relations Act, as amended. Briefs were filed after the close of the hearing by the Respondent and the Charging Union.

Upon the entire record and my observation of the witnesses, I make the following:

—2—

Findings of Fact

I. The Business of the Respondent

The Respondent is a Pennsylvania corporation, engaged in operating retail drug stores in several states. The store involved in these proceedings is located in Kenosha, Wisconsin. During the past calendar year, a representative period, Respondent's sales through all its retail stores, exceeded $500,000. During the same period, it purchased goods and material from points outside the State of Wisconsin in an amount in excess of $50,000, which were shipped, in interstate commerce, to the Kenosha store. I find that the Respondent is engaged in commerce within the meaning of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

Decisions and Orders of the National Labor Relations Board and Trial Examiner

II. The Labor Organization Involved

Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Sequence of Events*[1]

The Union's campaign to organize the employees at Respondent's drug store at Kenosha, Wisconsin, began in May 1966 when it obtained three authorization cards and continued into, or was resumed, in August when it obtained another seven cards. With a total of 10 cards in its possession, the Union mailed three separate communications on August 24 to the Respondent's president at the home office in Pittsburgh, Pennsylvania. They were (1) a recognition letter, in which it claimed that it represented a majority of the employees in the Kenosha store, requested a meeting at a specified time and place to discuss contract terms, and offered to prove its majority in an appropriate unit at that time by submitting its cards to an impartial third party for authentication of its claim; (2) a so-called Warning Notice in which the Union informed the Company that it was organizing its employees and already represented a "substantial number" of them, gave what it called official notice of its campaign and interest in a storewide unit, and cautioned the Company against intimidating its employees; and (3) a letter in which it enclosed a copy of a representation petition to the Board. The original petition was received by the Board the next day.

[1] All dates herein refer to the year 1966.

The three letters were received by the Company on Friday, August 26. The following Monday, August 29, the Respondent's attorney wrote the Union acknowledging receipt of the letters, stated that he considered the one requesting recognition and the one informing the Company of its organizational activity as "inconsistent and confusing," that the Company had advised him of its doubts

whether the Union represented an uncoerced and informed majority of its employees in an appropriate unit, and that it doubted the appropriateness of a single store unit. It also rejected the offer of a cardcheck because of the possibility of coercion or misrepresentation as to the purpose of the cards, and agreed to resolve the questions raised by the union letters "in a secret ballot election among the employees of the Company."

A stipulation for certification upon consent election was approved by the Regional Director on September 20, in which the appropriate unit was defined as all employees at the Kenosha store, excluding store manager, assistant store manager, lunch counter manager, professional employees, guards and supervisors as defined in the Act. A few days later, the Union filed its original charge in this case, alleging that the Company had committed violations of Section 8(a)(1). The next day, it requested the Board to proceed with the stipulated election, notwithstanding its charges. The election was held on October 12, and the employees rejected the Union by a vote of eight to seven. On October 18, the Union filed timely objections to conduct affecting the election, and on the same day it filed an amended charge alleging that the Company had unlawfully refused to bargain with it.

B. *The Issues*

The basic issue is whether the General Counsel has established that the Company's refusal to recognize and bargain with the Union was undertaken in bad faith, for the purpose of dissipating the Union's majority, or in rejection of the collective-bargaining principle. Resolution of that issue necessarily requires examination and determination of other questions; whether there was a proper request for recognition; the Union's majority status, which involves the composition of the appropriate unit and the validity of certain authorization cards; and whether the Company's total conduct was sufficiently grave to warrant setting aside the election and to direct a second election or order the Company to bargain despite the Union's loss of the first election.

C. *Adequacy of the Request for Recognition and Bargaining*

As noted above, on August 24, in separate letters the Union advised the Company that it represented a majority of the employees at the Kenosha store, that it was engaged in organizing and already represented a substantial number of the employees, and that it was filing a petition. The Company argues that the Union's demand for recognition was defective and invalid because its communications with the Company were inconsistent and confusing; it thereafter failed to clarify its position although invited to do so; and its offer to substantiate its majority showing by a card check was meaningless since the cards were no longer in its possession, having been submitted to the Regional Director as its showing of interest to accompany the petition.

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Standing alone, the Union's letter requesting recognition for all employees at the Kenosha store and offering to negotiate the terms of a bargaining contract upon proof of its majority through examination of cards (General Counsel's Exhibit 2) is unambiguous and unequivocal, and satisfies the Board's requirements in that regard. Nor does the filing of a representation petition simultaneously with a request for recognition and bargaining constitute a withdrawal or qualification of the Union's right to be recognized if, in fact, the Employer has no good-faith doubt of the Union's majority.[2]

The issue of the Company's asserted good-faith doubt will be discussed later, in connection with the violations of Section 8(a)(1) alleged in the complaint, and I limit myself for now to the Company's assertion that the separate communications of August 24 were, taken together, so inconsistent as to leave the Company in doubt as to how to proceed. Its confusion seems to be self-engendered and without any rational basis in fact. There was surely no real inconsistency between the claim in the recognition letter that it already represented a majority of the store employees, and the warning letter in which it called attention to its organizing campaign and claimed to represent a substantial number of employees. In effect, the Union was noting, perhaps superfluously but harmlessly, that it intended to continue its organizing drive in order to hold on to, and to expand, the answer of its adherents. Nor was the Union required to answer the attorney's letter of August 29 and thereby forego its claim to be the exclusive representative of the employees, simply because it had

[2] *Midwestern Manufacturing Company, Inc.*, 158 NLRB No. 144, and cases cited in footnote 3 thereof.

also filed a petition, and was willing to rely on an election as one of several appropriate means by which its majority status could be tested.

Finally, Respondent's claim that the Union could not establish its majority by means of cards because it no longer had them in its possession is without merit. If Respondent had offered to examine the cards, instead of rejecting that procedure in its letter of August 29, it would have been in a better position to complain if the Union was unable to produce the cards which it had turned over to the Regional Director. In any event, a bonafide offer on the Company's part to negotiate an agreement if a card check substantiated the Union's majority claim, would have enabled the Union to withdraw the petition and to reclaim its cards from the Regional Director.

D. *The Union's Majority Status*

The unit: The only variation between the unit stipulated as appropriate by the parties for purposes of the consent election, and that described in the demand letter and petition, is that the former specifically excluded professional employees while the latter did not. There were three pharmacists employed at the store at all times during the relevant period who, the parties agree, were professional employees within the meaning of Section 2(12) of the Act.

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Two of these were the manager and the assistant manager of the store, who were therefore also excluded as supervisory employees. The third pharmacist, Divjak, was a regular part-time nonsupervisory employee.

The parties agreed on the names of 14 employees who were employed on August 26, when the demand letter was

received by Respondent. The Respondent also urges that Divjak, the nonsupervisory pharmacist, and Petersen, classified as a merchandiser, must also be included in the count of employees against which the Union's majority status must be measured.

I am satisfied that Petersen must be included. Although he may have had some additional responsibilities for a short time between May 1966, when he came to work and July, when a pharmacist was hired to act as store manager, his duties in August and up to the date of this leaving, around September 15, were clearly nonsupervisory. Although he was not actually present at the store during parts of these months because of an accident and service in an Armed Forces Reserve camp, he was paid for those periods of absence.

His duties as a merchandiser were to display sundries, such as toys, pet supplies, etc., in the selling areas of the store, to requisition merchandise from the Company's central warehouse, take inventory, help unload trucks and put orders away. His duties as to ordering, inventorying, and stocking were no different in kind from those performed by the women employees in the cosmetics, tobacco, or drug departments. The testimony of the Company's personnel director that Petersen exercised no supervisory functions was not rebutted. Furthermore, his replacement after he left about September 15, was included on the eligibility list for the October election. I find that Petersen was the 15th employee in the unit described by the Union's demand letter.

Divjak presents a more difficult problem, because it requires a statutory interpretation which, to my knowledge, has not heretofore been squarely decided. The question is whether the Board may issue a bargaining order encom-

passing a unit in which a professional employee is included, thereby depriving him of the right prescribed by the proviso to Section 9(b)(1), of voting on whether he wishes to be included in a unit with nonprofessional employees.[3] Pre-

—6—

liminarily, I call attention to the fact that my discussion and holding on this issue will be dictum, since I also hold later on in this Decision, that the Union had 10 valid authorization cards, sufficient to establish its majority whether the appropriate unit consists of 16 or 15 employees, that is, whether Divjak is to be included or excluded. However, 2 cards, those of Hix and McClelland, are included in that majority of 10, and if I am wrong in counting them, the resulting total of 8 is sufficient to prove majority only if Divjak is excluded, and the unit is confined to 15 employees.

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[3] The relevant statutory provisions to which I will refer are set out here. The italics in all cases is, of course, mine, for emphasizing particularly pertinent language.

Sec. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a).*

* * * * *

Sec. 9. (a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* that the Board shall not (1) *decide that any unit is appropriate for such purposes* if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . .

The Respondent argues that the Union's demand letter of August 24, by claiming to represent *all* employees at the Kenosha store, excluding only supervisors, implicitly requested that Divjak be included in the unit as a regular part-time professional employee, and that it act as his representative. It is true, as Respondent points out, that Section 9(b)(1) does not prohibit the establishment of bargaining units composed of both professional and nonprofessional employees, but requires only that the former be given a self-determination election on whether they wish to be included in such a mixed unit.

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The Respondent also points out, that if it had voluntarily recognized the Union as the exclusive representative of the employees claimed to be the appropriate unit in the Union's demand letter, the Union would have become Divjak's bargaining agent, and if an agreement had been entered into, he would have been bound thereby, even though he had not been given a choice between exclusion or inclusion. The case cited by Respondent for this proposition, *Retail Clerks Union Local No. 324 (Vincent Drugs)*, 144 NLRB 1247, as well as the later *International Telephone & Telegraph Corporation (ITT Federal Laboratories)*, 159 NLRB No. 145, hold that the Board will not strike down a relationship, voluntarily and consensually agreed to by the parties, in which professional employees have been joined without their prior consent, in a mixed unit with nonprofessional employees.

There is, in each of those cases, language to the effect that the Board is precluded by Section 9(b)(1) from establishing such a mixed unit, without self-determination by the professional employees, *in a representation proceeding*, or from *certifying* such a unit, thereby giving rise to a pos-

sible inference that the Board may do otherwise in proceedings where a Board-directed election under Section 9(c) is not invoked. Such an inference is not warranted because the Act, in my opinion, precludes the Board from establishing a mixed unit of professional and nonprofessional employees, without self-determination for the former, as prescribed by Section 9(b)(1) either in a representation proceeding under Section 9(c), or in an unfair labor practice proceeding under Section 8(a)(5) or 8(a)(1).

A union may achieve the status of exclusive bargaining representative for an appropriate unit, under Section 9(a), without first winning a representation election under Section 9(c).[4] The Board recognizes and validates the status thus obtained under Section 9(a), by a proceeding pursuant to Section 8(a)(5), or under certain circumstances, pursuant to Section 8(a)(1). But whichever paragraph of Section 8(a) is invoked, the Board must find that the unit in which the Union has achieved majority status is appropriate, and it must follow the applicable mandates of Section 9(b). The Board' *validation* of a unit as appropriate under Section 9(a) and (b) is necessarily quite different from a Board holding that parties who have consensually agreed to bargain with respect to an inappropriate unit may be permitted (or required) to continue their past course of action. In the former situation, the Board must affirmatively find a particular unit to be appropriate in all regards; in the latter it simply allows the parties to resume their extended history of bargaining for an inappropriate unit, without condoning their action but without declaring their conduct to be void *ab initio*.

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[4] *United Mine Workers of America* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72; *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 100-101.

I hold, therefore, that I am precluded from finding the unit sought by the Union in its recognition letter to be appropriate, because the Board may not, under Section 9(b)(1), include a professional employee in any unit if he

has not had the opportunity to decide whether he wishes to be joined with nonprofessional employees.[5]

The unit for which the Union requested recognition was not inherently inappropriate, as I have mentioned above, if the Company had voluntarily accorded recognition upon being satisfied that the Union had valid authorization cards from a majority of its employees. Since the Company refused to do so, the Regional Director approved a stipulation for a consent election for a unit from which professional employees were excluded. The basic character of the unit originally requested (all store employees excluding supervisors) was unchanged by the exclusion of a single nonsupervisory professional pharmacist, and the variation between the units defined in the original request and in the stipulation, is insubstantial.[6] I find, therefore, that the unit agreed to in the stipulation for certification upon consent election is a unit appropriate for the purposes of collective bargaining.

Authentication of signatures: Ten dated and signed authorization cards were offered and received in evidence.

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[5] The distinction between a Board finding and a Board certification of an appropriate unit is explicitly drawn in Section 9(b)(3) with respect to the two separate standards for labor organizations which represent guards. See *The William J. Burns International Detective Agency, Inc.*, 134 NLRB 451, where the distinction between the two is discussed and specifically relied upon.

[6] *Heck's Inc.*, 156 NLRB 760, 765-767; *Ottenheimer and Company, Inc.*, 144 NLRB 38, 46; *Galloway Manufacturing Corporation*, 136 NLRB 405, 408; and *The Hamilton Plastic Molding Company*, 135 NLRB 371, 373.

Four employees (Alberta Story, Lana Pfeiffer, Jacquelyn Zellen, and Sophie Zebrowski) personally identified their own signatures, and no question is raised as to the authenticity of those cards.

Paul Whiteside, Jr., a representative of Retail Clerks International Association, District Council No. 14, testified that he had witnessed the signing of four additional cards. They are those of Evelyn Massie, Louis Vena, Lois Wasiulewski, and Teresa Witt. In its brief, the Respondent urged that the four cards which Whiteside said had been signed in his presence, but which were not personally authenticated by their signers should not be counted towards the Union's majority, because the General Counsel failed to call the four signers to identify their signatures or to establish that they were unavailable to testify. The contention has been uniformly held to be without merit. A card may be properly authenticated by a witness who testifies that he observed its signing.[7] Since Whiteside's testimony was com-

petent and probative, it is immaterial that the General Counsel may have relied on other methods of proving the authenticity of the cards.

The last of the 10 cards are those purporting to be signed by Hazel Hix and Nancy McClelland (General Counsel's Exhibits 9 and 10). The General Counsel called Beverly Crowe as his witness to vouch for the genuineness of Hix's and McClelland's signatures on these two cards. Crowe is not employed by the Respondent, and at her place of em-

[7] *Don the Beachcomber,* 163 NLRB No. 36, footnote 2; *Lifetime Door Company,* 158 NLRB No. 3; *Colson Corporation* v. *N.L.R.B.,* 347 F.2d 128, 134 (C.A. 7); *N.L.R.B.* v. *Economy Food Center, Inc.,* 333 F.2d 468, 471 (C.A. 7).

ployment she serves as a steward for the Charging Union. After preliminary questions as to her name and employment, Crowe testified as follows, in response to the questions of Mr. Selby, counsel for the General Counsel.

> Q. I hand you what has been marked General Counsel's Exhibit 9, for identification, and ask you if you recognize the signature.
>
> A. Yes.
>
> Q. Whose is it?
>
> A. Hazel Hix.
>
> • • • • •
>
> Q. When was that card signed?
>
> A. May 26th, 1966.
>
> Q. I hand you what has been marked General Counsel's Exhibit 10, for identification, which purports to be an authorization for representation. Do you recognize the signature on that card?
>
> A. Yes.
>
> Q. Whose is it?
>
> A. Nancy McClelland's.
>
> Q. When was that card signed?
>
> A. August 19th, 1966.

I admitted these two cards over the objection of Respondent's counsel that they had not been properly identified. He was afforded the opportunity to examine the witness on *voir dire* and to cross-examine her, but chose not to do so.

This was the extent of General Counsel's efforts to establish the genuineness of the signatures on these cards. I merely restate the obvious, for emphasis, by pointing out that Crowe did not testify that the cards were signed in her presence, or that they had come into her possession in connection with her duties as a steward for the Union. On the

other hand, the Company did not question her claim that she recognized the signatures of Hix and McClelland. It chose to forego examining her on her basis for comparing these signatures with other signatures of Hix and McClelland which she knew to be genuine. For all that appears here, Crowe's claim that she recognized the signatures might have been supported by exact and detailed knowledge based on her prior examination of many known genuine signatures of Hix and McClelland, or it might be an outright falsehood, or else based on ridiculously inadequate opinion. But neither the General Counsel nor the Company wished to inquire further, for reasons best known to themselves.

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Each was willing to rest his case on the barest minimum. For example, neither party claimed that Hix or McClelland was unavailable to testify, nor did Respondent attempt to prove the falsity of the signatures by comparing them with samples of authentic signatures from tax withholding forms, payroll records, etc., which it might have in its possession. Of course, it was unnecessary for the Respondent to put forth any effort to help the General Counsel prove his case, and the question as to whether I was right in receiving General Counsel's Exhibits 9 and 10 is whether the General Counsel's submission, through Crowe's testimony, established a *prima facie* case.

Respondent's brief states that "The Board and the Courts have consistently held that, if authentication by other than the signer is to be permitted, the party authenticating must have been a witness to the execution." The statement is incorrect. The cases do not so hold, nor do the three cases which Respondent cites in his brief for the proposition in fact support his argument. The Board will accept as authentic, for example, authorization cards which

were returned to the person soliciting them even though the solicitor did not witness the act of signing.[8]

Turning to the three cases cited by Respondent as supporting the contention set out above, in *The Colson Corporation,* 148 NLRB 827, the Trial Examiner rejected Stimel's card because he did not believe Crayne's testimony that Stimel had returned a signed card to him, rather than because Crayne had not seen Stimel sign the card. See footnote 5 of the Trial Examiner's Decision at page 840. In the second case, *Winn-Dixie Stores, Inc.,* 153 NLRB 273, 306, the Trial Examiner rejected Mobley's card because the testimony of Johnson, the solicitor, as to when the card was signed was not persuasive, rather than because he had not seen Mobley sign.

Nor does *Henry Colder Company,* 163 NLRB No. 13, support Respondent's argument that authentication of a signature may be established only through the testimony of the signer or of someone who witnessed the signing. It may be that *Colder* casts doubt on the precedental value of the holding in *I. Taitel and Son,* 119 NLRB 910, enfd. 211 F.2d 1 (C.A. 7), that cards may be authenticated by a union representative (a) where his testimony shows that they were obtained in the course of the union's organization campaign from key employees who secured them and (b) where opportunity is given the employer before or at the trial to check their authenticity. But whatever may be inferred from the Board's remand to the Trial Examiner in *Colder,* as to the *Taitel* holding, it does not have the scope which Respondent attributes to it, since in *Colder* itself the

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[8] *Texas Electric Cooperatives, Inc.,* 160 NLRB No. 33 (cards of Christian, Whinery, and others); *Gordon Manufacturing Company,* 158 NLRB No. 131 (Oliver); and *Lifetime Door Company,* 158 NLRB No. 3 (Holmes).

Board approved the genuineness of the cards signed by Arlene E. Locke whose authenticity was established through the comparison of the signature on the card with an admittedly genuine sample of the same person's handwriting. In the *Colder* case, the comparison of Locke's signature with other samples of her signature was made by a handwriting expert, and the use of such experts has been approved by the Board in other cases.[9] Furthermore, the Board has accepted a comparison of signatures even by nonexperts.[10]

There is thus no reason to believe that signatures must be authenticated in a more restrictive manner in Board proceedings than in other administrative or in judicial proceedings. Wigmore's treatise on Evidence (3d ed. 1940) supplies overwhelming precedent that the genuineness of signatures may be proved by the testimony of those who did not witness the actual signing. Handwriting experts may state their opinion as to whether A signed a particular document, by comparing A's purported signature thereon with his known genuine signatures; and nonexperts may state their opinions based on their familiarity with A's handwriting. The competency of a nonexpert witness to state an opinion as to the genuineness of A's signature may be tested by examining him on his claim that he is familiar with A's handwriting. But if the party who contests the genuineness of A's signature does not impugn the witness' claim of familiarity, the document is admissible in evidence,

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[9] *Aero Corporation*, 149 NLRB 1283, and *Benson Veneer Company, Inc.*, 156 NLRB 781, 792.

[10] *Philamon Laboratories, Inc.*, 131 NLRB 80, footnote 1 of I. R. enfd. 298 F.2d 176, 180; *Tom's Supermarket, Inc.*, 157 NLRB No. 106 (Tweedie's card).

and the question of genuineness is then left for the trier of fact.[11]

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To return to the specific evidence in the instant case, Crowe testified that she recognized Hix's and McClelland's signatures. Her assertion of recognition was in effect a claim that she was familiar with their signatures and had made a mental comparison of the purported examples shown to her with other examples which she knew to be genuine, and that in her opinion, the signatures on General Counsel's Exhibits 9 and 10 were indeed those of Hix and McClelland. If Respondent believed that Crowe was not competent to express an opinion because of her lack of familiarity with the signatures of Hix and McClelland, it need only have asked her on what she based her claim of being able to recognize these signatures. Its failure to do so was a calculated gamble, not an oversight, since it had already examined Whiteside on his claim of recognizing

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[11] See 7 Wigmore, *Evidence* § 2131 (3d ed. 1940).

Modes of Authenticating Documents. Some of the various possible modes of evidencing a document's genuineness are, of course, never questioned to be sufficient to entitle it to go to the jury. Those about which question has arisen are only certain kinds of circumstantial evidence.

It will be necessary therefore to eliminate at the outset the kinds of evidence as to which there is no dispute from the present point of view.

* * * * * *

(3) *Circumstantial evidence* is of various sorts; and first, of those not here involved:

(a) *Style of handwriting, i.e.,* similarity between that of the document and that of the person alleged as its maker, is a sort of circumstantial evidence (*ante,* § 383) undisputed in its sufficiency; the controversies have arisen over the proper modes of proving the fact of similarity.[4]

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[4] The type of handwriting may be evidenced by *persons familiar* with it (*ante* §§ 693, 2008); . . . (Underscoring in original.)

the signatures on the cards which had been signed in his presence, and was able to show the insubstantiality of his opinion. Respondent might have been able to do the same with Crowe if it had tried, but it chose not to.

On the basis of the thin and barely adequate identification by Crowe that she recognized the signatures on General Counsel's Exhibits 9 and 10 as being those of Hix and McClelland, I affirm my ruling admitting those exhibits in evidence, and find that the purported signatures are genuine, and the authorization cards valid.

The alleged misrepresentations: The signed cards which the Union obtained in its organizational campaign are headed "Authorization for Representation." The substantive provisions of the cards authorize the Union to represent the employee signing it for the purposes of collective bargaining in accordance with applicable law. Respondent's brief argues that the Union made material misrepresentations to most of the employees who signed.

It argues that Lana Pfeiffer's card should not be counted because Zellen told her that the "only" purpose of the card was to obtain an election, and that the Union needed cards from a majority of the employees to insure an election. Respondent's contention loses much of its force since its inquiries were based on its understanding at that time that Pfeiffer had signed a card on *Zellen's* solicitation. Pfeiffer's later testimony showed that this was not so. Pfeiffer said she had complained to Jackie Zellen that her wages were low, and Zellen had said the wages would be higher if they had a union. Zellen then said they needed so many girls to have a union, that she herself had signed up, and if Pfeiffer wanted to sign up she could be a member to help the majority. Zellen did not have an authorization card with her

and did not solicit Pfeiffer's signature. A few weeks later, on her own initiative, Pfeiffer asked Nancy McClelland to bring her a card when McClelland went to get hers. Pfeiffer's answer to Respondent's question as to whether Zellen had told her that the only purpose of the card was for an election was, "for a union, yes, for higher wages." The answer, as well as Pfeiffer's entire testimony, shows clearly that Zellen nor anyone else misrepresented the purpose or effect of the card.

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Zellen testified at one point that Crowe had told her that in order for the Union to obtain an election it needed cards of two-thirds of the employees. Respondent alleges that this is a material misrepresentation which should invalidate Zellen's card. This is apparently a claim that Zellen was misled into signing a card, but I fail to see why. Crowe told Zellen, according to the latter's testimony, that if the Company did not recognize the Union voluntarily they would then have an election if two-thirds of the employees had signed cards. The misstatement, or Zellen's misunderstanding of what Crowe told her, was not material since Zellen's testimony also clearly shows that she was told that an election would only be necessary if the Company refused to recognize the Union on the basis of a card check.

Respondent also contends that the five cards solicited by Union Representative Whiteside are invalid because "the obvious intent and effect of Whiteside's statements is that the only purpose of the card is to obtain an election." What Whiteside actually said was that the authorization cards would be used for a card check and if that failed, for an election. He also told the employees who signed the cards that companies usually do not agree to card checks, and if their employer, did not, they could vote as they pleased in

the election. He did not tell them, as Respondent contends he should have, that their authorization cards might be used to support a bargaining order or might supersede their vote. It is this omission, Respondent contends, which amounts to a representation that the only purpose of the card was to obtain an election. It is obvious that Whiteside was only soliciting cards, and not attempting to give a quick course in labor law. What he said was accurate and correct, and his basic point, that the cards could be used to establish the Union's majority without an election, is an accurate summary of what the cards themselves say.

In summary, I find that the Union had obtained 10 valid authorization cards when it requested recognition, and that this constituted a majority of the 15 employees in the unit of all store employees, excluding professional employees, guards and supervisors, which I have found appropriate.

E. *Alleged Violations of Section 8(a)(1)*

1. Before the election

The Company's supervisors immediately responsible for day-to-day operations at the Kenosha store during August and September were Donald Schneider, store manager; Charles Wearing, assistant store manager; and Dolores Davis, fountain manager. E. A. Montini, food service director, and Donald Bell, the personnel director, were management and supervisory officials with the duties and responsibilities indicated by their titles, for operations at all stores. Montini and Bell both visited the Kenosha store during September and spoke to various employees there.

Schneider, Wearing, Davis, and Montini were not called to testify, and their various conversations with store em-

ployees, as testified to by witnesses for the General Counsel, are in effect uncontradicted. Story, Zebrowski, and

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Zellen testified that Store Manager Schneider had spoken to each of them individually on many occasions between August 26 and October 12, the date of the election, telling them that the store would close down if the Union came in. Pfeiffer also testified that Schneider had told her several times, in effect, that there was no need to worry about little things because if the Union got in, the store would close down.

Story also testified that she participated in a conversation with Schneider, Sophie Zebrowski and her husband, and employee Evelyn Massie about September 10, when Schneider said he was planning to give everyone a raise to $1.50 per hour. Mrs. Zebrowski then asked him what guarantee they had that they would not be fired after the election, and that Schneider had promised that none of the girls would be fired if the Union did not come in. On another occasion, according to Story, Schneider asked her and Pfeiffer if there wasn't to be a union meeting the next day and when she said, "We know you've got your spies," he answered "Yes, I know everything that's going on with the union business."

A few days after the consent election was agreed to, Schneider asked Story if she would like to come in to work for a couple of hours on the day of the election, even though she was not scheduled to work that day. Story said she would be in to vote election day, to which Schneider said, "I thought you'd like to get some time in before the 12th, because if the Union gets in, you're not going to get any time in after the 13th."

Zellen testified that she had gone to the store on September 15 to meet Lana Pfeiffer and go with her to a union meeting. Schneider said to them that he did not know why they bothered going to a union meeting, it was not going to do them any good anyway, but that he could get a job anywhere.

Although Assistant Manager Wearing does not seem to have been as active as Schneider during this period, Zebrowski did testify that whenever she met him in the stockroom he also said that if the Union got in, the store would close.

Based on their uncontradicted testimony and their demeanor while testifying, I credit Story, Pfeiffer, Zellen, and Zebrowski and find that Schneider and Wearing made the statements recited above. I find that their remarks that the store would be closed if the Union came in, Schneider's offer to let Story work on a nonscheduled day, his statement that he was planning to raise everyone to $1.50 per hour, the threat implicit in his remark that none of the girls would be fired if the Union did not come in, and his statement implying that he knew what was going on with the union business, and that it would not do them any good to go to a union meeting, all constituted illegal interference, restraint, and coercion within the meaning of Section 8(a)(1).

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Pfeiffer testified that Davis, the fountain manager, asked her on two occasions in mid-September how she was going to vote in the union election. During this period, Davis also asked her if she had gone to a union meeting which had been held the evening before.

Pfeiffer and Zellen testified that in separate conversations with each of them Davis had told them that if any

applicants for employment appeared in response to a help-wanted advertisement which the Company had just run, that they were to find out whether the applicant was for a union, and if she was, to tell her that the job had already been filled or that the manager was not in to take the application.

Zellen also testified that a week or so before that conversation, Davis had told her, while Nancy McClelland was also present, that she, Davis, was to find out how they were going to vote.

Based on their uncontradicted testimony and their demeanor while testifying, I credit Pfeiffer and Zellen, and find that Davis made the statement recited above. Inquiries as to how an employee is going to vote, and whether she had gone to a union meeting, and orders to turn away applicants who are favorable to a union reasonably tend to intimidate employees in the exercise of their right to support a union and are thereby violative of Section 8(a)(1). I so find here.

Pfeiffer testified as to three conversations in September with Montini, the food service director. In the first such conversation, Montini asked her if she had been to union meetings and if she had a personal gripe, since anyone who wanted the Union must have a personal gripe. He also said that the fountain employees would not necessarily get a raise even though the other employees might, that they might lose their separate store and food discounts, and in the long run would lose more than they would gain if the Union got in. She also testified that Montini had said in the same conversation, that the fountain was a separate department in the store, that it was not making as much money as it should, and that he could close it any time.

In their second conversation, Montini told her he knew that she, Alberta (Story) and Jackie (Zellen) had been to a union meeting and asked her if she knew what wage rate the Union was offering. She said she did not, and Montini then said that if the Employer and Union decided on wages, it would not be more than $1.15 per hour and that the employees would lose their food and store discounts. Again he asked her what her gripes were and she told him that the employees were interested in the Union because they thought it could get them higher wages, to which he replied that he was not allowed to make any promises then, because it might look like a bribe but that in October the Company would decide which employees were deserving of a raise.

In their third conversation, a few weeks later but before the election, Montini repeated some of the points he had previously made, such as the loss of food discounts if the Union got in.

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Zellen's testimony as to her conversations with Montini substantially corroborates that of Pfeiffer. Zellen said that Montini told her he was there because of the union activities, that the fountain employees were overpaid at $1.10 per hour because employees at other stores were not given a store discount or a food allowance; and that if the employees obtained a union they would lose their discounts.

Based on their uncontradicted testimony and on their demeanor while testifying, I find that Pfeiffer and Zellen testified credibly as to what Montini said to them. I find that Montini threatened them with loss of their store and food discounts, and threatened Pfeiffer with closing down the fountain department if the Union won. His statement

that the employees would not get more than $1.15 per hour if the Union got in, accompanied by his statement that in October the Company would decide on raises would reasonably tend to impress on Pfeiffer and the other employees that their chances for wage raises would be improved if they defeated the Union. Respondent violated Section 8(a)(1) by Montini's threats and promises of benefits detailed above.

In connection with his duties as personnel director, Bell visited the Kenosha store about September 8 and 9 and spoke to all the employees individually. He testified that he did so because Kenosha was a fairly new operation and he wanted to inform himself about the personal background of the store employees, to explain the company benefits, and to find out what problems the employees might be having. Only Story and Zebrowski were called by the General Counsel to testify as to their interviews with Bell. During Bell's inquiry as to their problems, both Story and Zebrowski brought up their desire for more money. Bell took advantage of the opening thus presented him by telling them in effect that his hands were tied while the union business was unfinished, but that the Company was aware of the problem. Story amplified this by testifying that Bell also said everyone could count on a substantial raise in October, while Zebrowski said that Bell had told her the Company was in the process of talking about giving raises to the girls, but that their hands were tied now that the Union was talking about coming in. Bell testified that he said only that the Company reviewed wages in October.

I think it more likely that Bell limited himself to the remarks he testified to—that the Company reviewed wages in October. Although Story and Zebrowski forthrightly

told him in their interviews that they wanted more money, and thereby gave him a favorable opportunity to let them know that raises might be forthcoming next month, neither Story's nor Zebrowski's testimony indicates that the possibility or expectancy of a raise was conditioned on the Union's defeat. I am satisfied that the Company's annual wage review for employees at all its stores did occur in October. I find that Bell's implicit promise that their complaints about wages would be considered was made pursuant to the Company's regular practice of reviewing employee wages every October, and was not conditioned on their rejection of the Union. I therefore find no violation of Section 8(a)(1) in any of Bell's remarks to Story and Zebrowski.

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2. After the election

About 2 weeks after the election, and while the Union's objections were pending before the Regional Director, the Company granted wage increases to its employees. The complaint alleges that the grant of increases at that time was an independent violation of Section 8(a)(1), as well as a violation of Section 8(a)(5).

Within a week or so after the election, about half the employees at the store quit voluntarily. Some of these had been earning less that $1.40 per hour. Their replacements were hired at $1.40, and those old employees who remained and who were not above that minimum were given raises so that their new rates matched or exceeded the newly established minimum.

The Company argues that the grant of wage increases after the election was prompted by its normal policy of reviewing all wages throughout its chain of more than 100

stores each October; that it had already established a $1.40 minimum at the stores it was currently opening, because that was to be the new statutory minimum as of February, 1967, under the Federal Wage-Hour Laws, and because many of the employees who had recently quit had been dissatisfied with their low wages.

I consider these to be legitimate business considerations warranting the grant of wage increases at that time despite the pendency of the objections to the election. I am aware of those cases in which the Board has held that wage increases or benefits granted after an election while objections are pending, are in violation of Section 8(a)(1) as being calculated to influence the employees' choice of a bargaining representative if a second election were directed, and as a reward for having rejected the Union.[12] These were, however, cases in which the benefits granted would have been illegal, under the rationale of *N.L.R.B.* v. *Exchange Parts Company*, 375 U.S. 405, if they had been bestowed before the election. In the instant case, on the contrary, the evidence shows no deviation from the Company's normal and regular practice of reviewing wages throughout its entire chain of stores in October, and to make such adjustments as were called for by legitimate business considerations.[13]

On the basis of the evidence presented in this case, I believe that the wage increases granted late in October

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[12] *Ambox, Incorporated*, 146 NLRB 1520, 1521, enforcement denied on this point, 357 F.2d. 138, 141 (C.A. 5); *Northwest Engineering Company*, 148 NLRB 1136, 1144, enfd. 64 LRRM 2650 (C.A.D.C.) March 24, 1967; *Gal Tex Hotel Corporation, d/b/a Admiral Semmes Hotel and Motor Hotel*, 154 NLRB 338, 342; and *Ralph Printing & Lithographing Co.*, 158 NLRB No. 128.

[13] See *Sheboygan Sausage Company, Inc.*, 156 NLRB 1490, 1497, and *True Temper Corporation*, 127 NLRB 839, 842.

were justified by the approaching February 1967 deadline for raising the minimum under the Wage-Hour Laws, and were not, therefore, either premature or excessive. I find

no independent violation of Section 8(a)(1) thereby, but in view of my intention to find a violation of Section 8(a)(5) in the Company's refusal to recognize and bargain with the Union as the authorized representative of a majority of its employees in an appropriate unit, I nevertheless find that the unilateral institution of these wage adjustments was a violation of the Respondent's obligation to bargain with the Union.

F. *Alleged Violation of Section 8(a)(5)*

I have found that the Union represented a majority of the employees in an appropriate unit at the Company's Kenosha store when it requested recognition and bargaining. The General Counsel, however, is also obligated, as part of his case, to establish that the Respondent refused in bad faith to recognize and bargain with the Union after it attained its majority status or, as the principle is frequently stated in expanded terms, because it rejected the concept of collective bargaining or sought to use the time thus gained to undercut and destroy the support of its employees for their chosen representative. The independent violations of Section 8(a)(1) which I found have occurred were pervasive and substantial. They consisted of threats by every one of the three supervisors in actual charge of the store's operations, and by Montini, who because he represented a higher level of management would tend to impress upon the employees the concern which top officials of the Company felt about their activities. Four employees, out of a total of 16 nonsupervisory employees,

testified credibly to the month-long effort of the Respondent to convince them of the dire consequences likely to result from their continued support of the Union, through their threats and coercive interrogations. In circumstances such as these, the Respondent's reliance on cases in which the Board found no causal relationship between isolated violations of Section 8(a)(1) and the loss of the Union's majority is misplaced.[14]

Affirmatively, Respondent contends that it had a good-faith doubt as to the Union's claim of majority representation. Its argument that the Union's conduct on August 24 in sending it three separate communications was ambiguous and inconsistent, has already been considered and rejected. It also relies on the fact that the Kenosha store has been in operation only 8 or 9 months, that it had had a high rate of employee turnover, and that it had always at-

tempted to keep in close contact with its employees and was therefore dubious of the Union's claim on the extent of the support it had won at the store. It also urges, as evidence of its good-faith doubts, that it was willing to proceed with a consent election to test the Union's claims. These assertions might, in other circumstances, have established a good-faith doubt, but here their force has been effectively blunted by its aggravated conduct in coercing

[14] Compare *Aaron Brothers Company of California,* 158 NLRB No. 108, *Hammond & Irving, Incorporated,* 154 NLRB 1071, and *Cameo Lingerie, Inc.,* 148 NLRB 535, which the Respondent relies on, with the following cases in which the Board, with court approval, held that the employer had rejected the union's request to bargain, in bad faith: *Elliott-Williams Co. Inc.,* 143 NLRB 811, enfd. 345 F.2d 460 (C.A. 7), *Boot-Ster Manufacturing Company, Inc.,* 149 NLRB 933, enfd. 361 F.2d 325 (C.A. 6), *Gotham Shoe Manufacturing Co., Inc.,* 149 NLRB 862, enfd. 359 F.2d 684 (C.A. 2), and *Frank C. Varney Co. Inc.,* 151 NLRB 280, enfd. 359 F.2d 774 (C.A. 3).

and intimidating its employees, thereby making impossible a fair test of the Union's majority claims.

The Respondent also contends that a bargaining order against it would not be warranted because the Union has in the meantime lost the effective support of its former adherents, and because the doctrine of the *Bernel Foam* case, 146 NLRB 1277, is not applicable here. I will consider the contentions in that order.

Respondent expresses concern that its present employees will be deprived of their right to refrain from self-organizing activities if a bargaining order is issued here. It is true that seven employees left almost immediately after the election, and that apparently none of them claimed that the Union's loss of the election was the reason for their quitting. It is worthy of note, however, that all seven had signed authorization cards. In any event, the Respondent argues that the Union would have lost its majority without regard to whether Respondent had committed some unfair labor practices. In effect, it seeks to benefit from its own illegal actions in thwarting its former employees' desire for representation by advocating the right of its present employees to refrain from such activities. The Supreme Court's decision in *Franks Brothers Company* v. *N.L.R.B.*, 321 U.S. 702, exposes the untenability of Respondent's argument.

Since the facts in no two cases are ever exactly alike, the Respondent is able to point out certain factual differences between this case and *Bernel Foam Products Co., Inc.* 146 NLRB 1277.[15] In *Bernel*, the petition was filed after a

[15] In *Bernel*, the Board reverted to its former doctrine that a union may be entitled to a bargaining order based on its majority status even though it had lost an election in which it participated with knowledge of the employer's commission of unfair labor practices.

request for recognition was refused; here, it was filed simultaneously with the request. Respondent argues that *Bernel* does not govern this case since here the refusal to bargain did not induce the filing of the petition, and consequently that the Union had a genuine choice of remedies here, unlike the union in *Bernel.* I think the factual differences between the two cases are immaterial. Before *Bernel,* a union, knowing of an employer's unfair labor practices, had a one-time choice between proceeding with an election or seeking a bargaining order. The reversal of that doctrine was intended to abolish the necessity of making that choice,

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and to permit a union to go forward with the election and thereafter, if it lost, to prove its preexisting majority in an unfair labor practice proceeding. Respondent's distinction based on which came first, the petition or the request, would merely impose an illogical limitation on what the Board clearly intended to accomplish.[16]

Respondent also relies on another factual distinction between this case and *Bernel* to argue that the Union should be limited to a choice between an election or an 8(a)(5) proceeding. It points out that here the Union filed charges of 8(a)(1) violations after it filed its petition but before the election was held. In conformity with Board regulations, it also requested the Regional Director to proceed with the election despite its pending charges. After the election, it filed objections and an unfair labor practice charge alleging a wrongful refusal to bargain. Respondent contends that this gave the Union an even greater advantage than it was entitled to under the *Bernel* doctrine,

[16] *Midwestern Manufacturing Company, Inc.,* 158 NLRB No. 144, and cases cited in footnote 3 thereof.

in allowing it to keep its 8(a)(1) charges in abeyance until it knew whether it had won or lost the election, and then to rely on those as the basis for its 8(a)(5) charge. This is said to permit the Union to harass the Respondent and to abuse Board processes. Like the previous argument, Respondent's concern that the Union may act only in a fixed step-by-step fashion, is misplaced. That the Union filed 8(a)(1) charegs before, instead of after the election, does not affect the Board's reasons for allowing a union to participate in an election and then prosecute a refusal-to-bargain charge. The Respondent believes the *Bernel* doctrine is unfair, and it is entitled to urge the Board to overturn it, but its attempt to pay lip service to it while distinguishing this case from it factually, is no more than a roundabout attack on *Bernel* itself.

IV. Objections to the Election

The Union filed timely objections to the conduct of the election. The Regional Director's report on the objections refers to evidence tending to show that between the filing of the petition and the election, supervisors and agents of the Respondent coercively interrogated employees concerning their union activities, threatened them with the closing of the Kenosha store and other reprisals, and promised them increases in wages and other benefits if they rejected the Union. I see no reason to consider other conduct which was alleged in the objections as grounds for setting the election aside since, in my opinion, the evidence at the consolidated hearing before me amply supports the conclusion I have reached that the election should be set aside, and that the Respondent should be required to bargain with the Union as the exclusive representative of its employees at the Kenosha store, based on its majority status as of August 26, 1966.

It is also immaterial that the objections did not specify all the conduct which I have found to be grounds for setting the election aside. The decision as to whether an election should be set aside is properly made on the basis of the

investigation or hearing, and not on the allegations specified in the objections to the election.[17] Here, moreover, the complaint alleged in what respects Section 8(a)(1) had been violated before the election, and such violations, if proved, are *a fortiori* grounds for setting the election aside, so long as timely objections were filed.

Conclusions

Accordingly, for the reasons stated above, I conclude that Respondent, by rejecting the Union's request on August 26, for recognition and bargaining, and thereafter engaging in unfair labor practices designed to destroy the Union's majority, refused to bargain with the Union in violation of Section 8(a)(5) of the Act.[18] I also find that by unilaterally raising the wages of its employees in October at a time when the Union was entitled to exclusive recognition as bargaining agent, Respondent violated the same section.[19]

Furthermore, even if I were to assume that the Company acted in good faith in insisting upon an election, a bargaining order is nonetheless appropriate in order to undo the effects of its subsequent unfair labor practices.[20]

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[17] *International Shoe Company*, 123 NLRB 682.

[18] *N.L.R.B.* v. *Joy Silk Mills, Inc.*, 185 F.2d 732 (C.A.D.C.).

[19] *N.L.R.B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U.S. 736.

[20] *N.L.R.B.* v. *Stow Manufacturing Co.*, 217 F.2d 900 (C.A. 2) and *Irving Air Chute Company, Inc.*, 350 F.2d 176 (C.A. 2).

Finally, the Board and the courts have also held in a number of cases, that where an employer's violations of Section 8(a)(1) have dissipated a union's majority and prevented the employees from freely exercising their choice of representatives, the Board may, in order to remedy the unfair labor practices, issue an order directing the employer to bargain with the union on request, provided that the union had a majority at all relevant times.[21] Under the doctrine of these cases also, a bargaining order is appropriate in this case.

Conclusions of Law

1. All employees at Respondent's Kenosha, Wisconsin, store, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards, and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. At all times since August 24, 1966, the Union has been the duly designated bargaining representative of the employees in the aforesaid collective-bargaining unit.

3. The Respondent has interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1), by threatening them that the Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts, by promising them wage increases and other benefits, by coercively interrogat-

[21] *Editorial "El Imparcial" Inc.* v. *N.L.R.B.*, 278 F.2d 184, 187 (C.A. 1), and [redacted]*R.B.* v. *Delight Bakery Inc.*, 353 F.2d 344 (C.A. 6).

ing them as to how they were going to vote, or if they had attended union meetings, by intimidating them through its orders to reject applications for employment from pro-union applicants, and by telling them that their attendance at union meetings had been observed and noted.

4. By failing and refusing on August 26, 1966, and at all times thereafter, to recognize and bargain with the Union as the collective-bargaining representative of the employees in the aforesaid unit, and by unilaterally changing the wages of employees in October 1966, without notice to or consultation with the Union, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, my Recommended Order will provide that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As indicated above, an order to bargain collectively with the Union is appropriate to remedy the Company's violations of the Act. Even in the absence of a refusal to bargain, I would find this remedy appropriate in the circumstances of this case in view of the Company's extensive violations of Section 8(a)(1), which prevented the employees from exercising a free choice in the election. In view of these conclusions, my Recommended Order will pro-

vide for dismissal of the pending representation proceedings, Case 30—RC—508.

The unfair labor practices found here are such as to indicate an attitude of opposition to the purposes of the Act generally. I find therefore that a broad cease-and-desist provision is necessary to effectuate the policies of the Act.

In its brief, the Union has asked me to recommend additional remedial provisions to enable it to retrieve the losses it sustained through the Company's unfair labor practices which effectively denied it the support of the unit employees it had previously enjoyed. It asks for provisions giving

it access to the Company's bulletin boards and premises under appropriate conditions, the opportunity to address unit employees on Company time and property during the compliance period, for additional relief of an unspecified nature to restore its economic strength to what it was when the Company refused to bargain with it, and to compensate it for its organizational expenses if the parties are unable to reach an agreement under the bargaining order. As an alternative, the Union suggests a remedial provision recently recommended by another Trial Examiner in a similar case, to make the employees whole by paying them the difference between the compensation they actually received and the rates received by employees in comparable units under union contracts for the period of the refusal to bargain.

Although I appreciate the Union's position that its bargaining strength has been seriously eroded by the Company's unfair labor practices, and that it is entitled to a restoration of the situation as it would have been, absent the unfair labor practices, it is nevertheless a question of

judgment whether the remedy I have prescribed above is in fact inadequate. Trial Examiners have, in the first instance, a responsibility to exercise their judgment in fitting the remedy to the violation, but with a proper regard for long-established Board practices in these matters. Since some, if not all of the proposals suggested by the Union, have been advanced in other cases now pending before the Board, I believe it would be a gratuitous gesture on my part to order such novel remedies until the Board has established guidelines in similar cases. I therefore deny the Union's request.

RECOMMENDED ORDER

Upon the foregoing findings and conclusions and the entire record, and pursuant to Section 10(c) of the Act, it is recommended that the National Labor Relations Board order that Thrift Drug Company of Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees that its Kenosha store or its fountain department would be closed down or that they would lose their store or food discounts because of their union activities.

(b) Promising employees wage increases and other benefits in order to interfere with their free choice of representatives.

(c) Coercively interrogating them as to how they were going to vote or if they had attended union meetings, intimidating them by ordering the rejection of applications for employment from prounion applicants, and telling them that their attendance at union meetings had been observed and noted.

(d) In any other manner interfering with, restraining, or coercing its employees in the exercise of their right to join, or assist Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

(e) Refusing to recognize and bargain collectively with Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit set forth in the conclusions of law above.

(f) Instituting changes in the wages, hours or other conditions of employment of its employees without notice to, or consultation with, Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as their exclusive bargaining representative.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, as the collective-bargaining representative of all its employees in the appropriate unit set forth in the conclusions of law above, with respect to rates of pay, wages, hours of employment, or other terms of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its store at Kenosha, Wisconsin, copies of the attached notice marked "Appendix."[22] Copies of said notice, to be furnished by the Regional Director for Region 30, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.[23]

The petition for certification of representatives in Case 30—RC—508 is hereby dismissed.

Dated at Washington, D.C.

CERTIFIED TRUE COPY

O. W. FIELDS

EXECUTIVE SECRETARY NLRB

DATE MAY 24 1967

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[22] In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

[23] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 30, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT threaten employees that our Kenosha store or its fountain department will be closed down or that they will lose their store or food discounts because of their union activities.

WE WILL NOT promise wage increases or other benefits in order to interfere with a free choice of representatives by our employees.

WE WILL NOT coercively interrogate our employees as to how they are going to vote or if they have attended union meetings, nor will we intimidate them by ordering them to reject applications for employment from prounion applicants, nor tell them that their attendance at union meetings has been observed and noted.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to join or assist Retail Clerks Union Local 526, Retail Clerks International Association, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL NOT institute changes in the wages, hours or other conditions of employment of our employees without notice to, or consultation with, Retail Clerks Union

Local 526, Retail Clerks International Association, AFL-CIO, as their exclusive bargaining representative.

WE WILL bargain, upon request, with the above-named labor organization as the exclusive bargaining representative of all employees in the unit described below, with respect to wages, rates of pay, hours of employment, or other terms of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees at our store in Kenosha, Wisconsin, excluding the store manager, assistant store manager, lunch counter manager, professional employees, guards and supervisors as defined in the Act.

All our employees are free to become or refrain from becoming members of the above-named labor organization or any other labor organization.

THRIFT DRUG COMPANY OF PENNSYLVANIA
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any queston concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Second Floor, Commerce Building, 744 North Fourth Street, Milwaukee, Wisconsin, 53203, Telephone 272-3861.

APPENDIX C

Excerpt From Petitioner's Brief Filed With the Court of Appeals for the Sixth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 18216

THRIFT DRUG COMPANY OF PENNSYLVANIA,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND SETTING ASIDE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD IN CASE NOS. 30-CA-458 AND 30-CA-508

BRIEF ON BEHALF OF PETITIONER

POINT VII

A BARGAINING ORDER IS AN IMPROPER AND INAPPROPRIATE REMEDY.

A. The Board Is Restricted to the Use of Secret Ballots for the Resolution of Representation Questions.

The legislative history of the National Labor Relations Act, as amended, clearly establishes that it was the intent

of Congress to limit the methods used for the selection of a collective bargaining representative to the secret ballot election and none other.[43]

The Board in support of its request for a bargaining order cites as authority cases decided prior to the Act's 1947 amendments or decisions which themselves cite pre-1947 decisions as controlling authority.[44] These amendments radically changed the Board's powers and responsibilities under Section 9(c).[45] Until recently a critical examination of the Board's powers under the Act, both before and after the 1947 amendments, had never been made by either the Courts or the Board.[46] An examination of the policy changes expressed in the Taft-Hartley Amendments reveals that the Board was stripped of its power to issue a bargaining order where a question of representation has been raised.

The relevant portions of Section 9(c) state:

> "(1) *Whenever* a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board . . . the Board shall investigate such petition. . . . If the Board finds upon the record of such hearing that such a question of representation exists, *it shall direct an election by secret ballot and shall certify the results thereof.*" (Emphasis added.)

This section *requires* that "*Whenever* a petition shall have been filed" and the Board "finds . . . a question of

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[43] *NLRB* v. *Logan Packing Co., supra.*

[44] See the analysis of cases, *supra,* pp. 69-71.

[45] 61 Stat. 136 (1947), 29 U.S.C. §§151-168 (1964).

[46] *Logan Packing Co., supra,* 66 LRRM at 2602.

representation exists", the Board "*shall* direct an election by secret ballot and *shall* certify the results thereof." *The Board is without authority to determine representation by other means once a petition has been filed and it has found a question of representation exists.*

1. The law prior to 1947.

Section 7 of the Wagner Act protected the right of employees to belong to unions, but gave no protection to those employees who wanted to refrain from union activities. Furthermore, under the Wagner Act, the Board had far greater latitude in the methods it could use to determine representation. The Wagner Act stated that the Board could determine representation by either "a secret ballot of employees, or . . . *any other suitable method.*" Section 9(c) of the Wagner Act provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties . . . the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and *may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.*" (Emphasis added.)

Accordingly, under that Act, the Board used as alternatives to elections, two informal non-election procedures: the "recognition agreement" and the "consent cross-check", both of which it codified in its rules and regulations and

statements of procedures. In its last Wagner Act Statements of Procedure (29 C.F.R.—NLRB Statements of Procedure §§202.1-28, 11 Fed. Reg. 177A-619, eff. Aug. 28, 1946) Section 202.17 described the non-election methods of determining representation as follows:

> "(a) The *recognition agreement* is used in a situation in which the employer is satisfied that the claims of the petitioner to representation rights are valid. . . .
>
> "(b) In the consent cross-check agreement procedure, the parties agree that a Board agent may determine whether or not the union represents the majority by comparing the number of valid signed cards submitted by the union with an appropriate payroll furnished by the employer. The agreement also describes the appropriate unit of employees involved and sets forth the understanding of the parties."

After some years of experience the Board began to question the conclusiveness of card checks[47] and found "that an election is generally the most effective and satisfactory method of resolving representation disputes." [48] Accordingly, "the election was the method almost invariably

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[47] See *Joe Hearin, Lumber,* 66 NLRB 1276 (1946), where the Board stated: "We do not feel, however, that a card check reflects employees' true desires with the same degree of certainty as . . . an election." (at 1283)

Electro Metallurgical Company, 69 NLRB 772 (1946), where the Board stated, that it "will not consider the card check as satisfactory as the election method of ascertaining the true desires of employees." (at 774)

And, *National Waste Material Corp.,* 93 NLRB 477 (1951), where the Board observed: "We have heretofore held that a card check is not entitled to the conclusive effect normally given to a certification of representatives based on a Board-directed election." (at 478)

[48] 8 NLRB Ann. Rep. 52 (1943).

utilized by the Board in contested [representation] cases ever since 1939." [49] In *The Cudahy Packing Company*, 13 NLRB 526 (1939), the Board explained its change of policy by pointing out that its certification "looks to the initiation of collective bargaining between the Company and its employees . . . [and] . . . the bargaining relations which result will be more satisfactory from the beginning if the doubt and disagreement of the parties regarding the wishes of the employees is, as far as possible, eliminated. Although in the past we have certified representatives without an election . . . we are persuaded by our experience that *the policies of the Act will best be effectuated if the question of representation which has arisen is resolved in an election by secret ballot.*" (at 531-32) (Emphasis added.)

With the law giving no protection to employees who did not want union representation, and specifically authorizing the NLRB to resolve questions concerning representation by any method it considered "suitable", the Board and the courts, in their decisions which *preceded* the 1947 Amendments construed Section 8(a)(5) and Section 9(a) as giving rise to a duty to bargain before election and before certification of the union.

It was during this pre-1947 period, that the cornerstone case of *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, (1944), was decided. Pursuant to the policy considerations then manifest in the Act, the Board issued a bargaining order after the withdrawal of an election petition and the filing of a refusal to bargain charge. The Board deemed a bargaining provision "necessary to effectuate the policies of the Act" (at 704).

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[49] 13 NLRB Ann. Rep. 21, n. 7 (1948).

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In 1947, the policies set forth by the Act changed.

2. Changes wrought by the Taft-Hartley Amendments.

The policy considerations manifest in the amendments to the Act in 1947 were in direct opposition to the policies then existing. Section 7, the employees' bill of rights, was amended to protect the right of an employee *"to refrain from any or all"* representation or activity.

In addition, Congress while leaving unchanged Section 8(a)(5) and 9(a), eliminated from Section 9(c) the language which had theretofore authorized the Board to resolve questions concerning representation by any "suitable method". This same deletion was made in Section 10. In place of these sections, Congress authorized "an election by secret ballot" as the only method of resolving a question of representation.[50]

The Taft-Hartley Act's legislative history confirms beyond doubt that this was the specific Congressional intent. The Hartley bill (H.R. 3020, 80th Cong. 1st Sess. (1947)) (Section 9 (c)(1) & 9 (c)(4)) *eliminated* the Wagner Act option to "utilize any other suitable method to ascertain . . . representatives". The House Committee Report on the Hartley Bill (H.R. Rep. No. 245, 80th Cong. 1st Sess. 39 (1947)) had these comments on what was later adopted verbatim as Section 9 (c)(4) of the present Act:

> "Section 9(h)—The present act does not, by its terms, provide for so-called 'consent elections' but the Board frequently holds them. The bill permits parties to waive hearings before the Board (providing no other

[50] Swigert, *The Duty To Bargain In The Absence Of Certification Proceeding*, 19 Ann. Conf. On Labor, N.Y.U. 61 (1967).

interested person intervenes and objects), but when the parties waive a hearing, *the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past.*" (Emphasis added.)

The Senate Minority Report on the Taft bill (S. Rep. No. 105, Part 2, 80th Cong. 1st Sess. 34 (1947)) confirms that both proponents and opponents of the change agreed on its effect. It had these comments on what was later substantially adopted as present Section 9(c)(1) and 9(c)(4):

"Section 9(c)(4) provides that nothing in the section shall be construed to prohibit 'the waiving of hearings by stipulations for the purpose of a *consent election* in conformity with the regulations and rules of decision of the Board.'

"*The effect of this provision read together with the provisions of Section 9(c)(1)(B) would be to prohibit the Board from determining an issue concerning representatives by means of a consent card check.* This procedure is utilized only where the parties consent and consists of a check of the union's membership cards against the names appearing on the employer's payroll . . .

"*. . . the bill in this respect would deprive the Board of a proved and useful technique* which the Board has been able to utilize in over 20 per cent of the adjusted representation cases. . . ." (Emphasis added.)

Noting the changes in the basic policy of the Act, the House Conference Report stated that:

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"Both the House Bill and the Senate Amendment provided that if the Board found upon the hearing that a question of representation existed, a secret ballot should be held and the results thereof certified." (H.R. Rep. No. 510, 80th Cong., 1st Sess. 50 (1947))"

The Board agreed that its power had been changed, stating in 13 NLRB Ann. Rep. (1948):

"Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the *sole* method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed (but rarely exercised) to utilize other 'suitable means' of ascertaining representatives." (at 32) (Emphasis added.)[51]

And, in *General Box Co.*, 82 NLRB 678 (1949), the Board explicitly rejected the concept of certification without an election in the following language:

"The concurring opinions of our colleagues propose that the Board certify the Petitioner here without an election, apparently after some other type of investigation of its majority status. Aside from the fact that such a procedure might well stimulate collusion and raise more problems than it would solve, we must point

[51] See also, 14 NLRB Ann. Rep. 26 (1949): "The Act as amended no longer leaves the Board with discretion to utilize any other suitable method than the secret ballot election to resolve a question concerning representation found to exist within the meaning of Section 9(c)." The Board subsequently deleted all references to "recognition agreement" and consent cross-check methods from its Statements of Procedure and its Rules and Regulations. NLRB Statements of Procedure, 29 C.F.R. §§202.1.36, Series 5; NLRB Rules and Regulations, 29 C.F.R. §§203.1-97, 12 Fed. Reg. 5656 (eff., August 22, 1947).

out that *the 1947 amendments deprived the Board of the power to certify without an election.*" (at 683) (Emphasis added.)

In addition to the foregoing amendments, Congress in 1947 amended Section 7 of the Act by specifically adding to the right to bargain collectively, the equal and specific right to *not bargain collectively* as the employees may freely choose. The 1947 amendments also resulted in the enactment of Section 9(c)(1)(B) in which Congress specifically granted to an employer the right to request an election whenever a union "presented to him a claim to be recognized as the representative defined in Section 9(a)."

This legislative history abundantly proves the depth of Congressional intent to establish as paramount federal policy the fact that employee rights to bargain collectively and to not bargain collectively are *equal* under the Act, and that these rights would be protected to the maximum possible degree by making a secret ballot election the *sole* method of representation determination.[51a] It would follow that the law should have changed with respect to the duty to bargain before election and certification.

3. Failure of the Board and the Courts to conform to new policy.

After the mandate from Congress in 1947, questions concerning representation should have been decided by the Board only by secret ballot election, the determination of majorities by card checks or by any device other than secret ballot election should have ended. This seems partic-

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[51a] Requiring elections before recognition in all cases would preclude the possibility of "sweetheart" contracts.

ularly true in view of the new requirement in Section 7 that the Board give equal protection to the non-union employees.[52] To give full scope to this right, a secret ballot would appear to be uniquely appropriate. In the leading case *after* 1947, *Joy Silk Mills* v. *NLRB*,[53] the Court of Appeals for the District of Columbia followed *Franks Bros., supra,* ignoring the legislative changes of 1947. In *Joy Silk Mills, supra,* the Court held that the "decision in *Franks Bros. Co.* v. *NLRB* . . . appears controlling, and the order of the Board is entitled to be enforced in the respect just discussed." [54]

Despite the clear change in policy manifest in the Act, in virtually every authorization card case the Courts rely on *Franks Bros., supra,* for the propriety of the compulsory bargaining remedy, permitting a union to become an exclusive representative without a 9(c) election. The endorsement of this remedy in *Franks Bros., supra,* may have effectuated the policies of the Act in 1944, but in 1947 the policies changed. Nevertheless, pre-1947 precedent that secret ballot elections were not the exclusive method of determining representation has unjustifiably survived, unexamined, screened by a myriad of inapplicable cross-citations.[55]

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[52] Swigert, *supra,* at 64.

[53] 185 F. 2d. 732 (D.C. Cir. 1950) *cert. den.* 341 U.S. 914 (1951).

[54] *Joy Silk Mills, supra,* at 745.

[55] A clear acknowledgment of this lack of analysis in the past on the part of the various appeals courts in card decisions, is set forth in *Logan Packing Co., supra.* The Court stated:

"... with no reference to the change wrought by Taft-Hartley, bargaining orders have been enforced in recent years on the authority

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The authorities relied upon in *Joy Silk Mills, supra,* were four pre-1947 decisions. The decisions cited in *United Mine Workers of America et al.* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 71, 72 (1956), another leading case, are either pre-1947 cases or decision by Courts of Appeals which similarly are supported by rote citation of old cases.

4. The Board's legal authority does not support its case.

The Board supports its bargaining order by legal authority which builds on the foundation of *Franks Bros. Co.* v. *NLRB, supra,* which is the ultimate authority relied on by all the other courts which have dismissed challenges to the Board's power to obtain a bargaining order. Subsequent court decisions cite *Joy Silk Mills Inc., supra,* other pre-1947 decisions, such as *Franks Bros., supra,* or *NLRB* v. *P. Lorillard Co.,* 314 U.S. 512 (1941), or other court decisions which rely on these cases.

All of the court cases which the Board consistently cites as upholding its right to utilize bargaining orders under

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of cases decided under the Wagner Act before the 1947 amendments. Those which are not supportable on the basis of the absence of any litigible factual question concerning representation should, at the very least, have taken note of the 1947 amendment, but oddly, none of them have. Cases holding that a refusal to bargain is a violation of 8(a)(5) when there is no question of representation have been lumped with cases construing the original Wagner Act 9(c) to enforce bargaining orders without regard to the essential predication of the earlier decisions.

• • •

"Without reference to the current statutory provisions, however, such decisions lack persuasive impact. Congressional enactments may not be ignored by judges. . . ." (66 LLRM at 2602) (Emphasis added.)

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Bernel Foam Products Co. Inc.,[56] such as the instant matter, share the common defect of depending on *Franks Bros. Co., supra,* or cases relying on it, or on other pre-1947 decisions:

(1) *Amalgmated Clothing Workers of America* (*Edro Corp.*) v. *NLRB,* 345 F. 2d 264 (2 Cir. 1965), cites *Joy Silk Mills, supra.*

(2) *I.U.E.R.M.W.* (*S.N.C.Mfg. Co.*) v. *NLRB,* 352 F. 2d 361 (DC Cir 1965) *cert. den.* 382 U.S. 902 (1965) cites *Joy Silk Mills, supra,* as "controlling here on most aspects of the case."

(3) *Colson Corp. NLRB,* 347 F. 2d 128 (8 Cir., 1965), cited *United Mine Workers* v. *Arkansas Oak Flooring Co., supra,* as upholding bargaining orders, but the footnote in that decision dealing with the issue primarily relies on *NLRB* v. *Bradford Dyeing Ass'n.,* 310 U.S. 318 (1940), which was before the Taft-Hartley amendments.

(4) *Irving Air Chute Co.* v. *NLRB,* 350 F. 2d 176 (2 Cir., 1965), relied upon the pre-1947 *P. Lorillard Co., supra.*

(5) *NLRB* v. *Delight Bakery, Inc.,* 353 F. 2d 344 (6 Cir., 1965), also relies on *P. Lorillard Co., supra* and *Franks Bros. Co., supra.*

Similarly, other cases frequently cited by the Board have the common thread of reliance upon *Franks Bros. Co., supra,* other pre-1947 decisions, or each other:

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[56] 146 NLRB 1277 (1964). The Board there held that proceeding to an election with knowledge of the employer's unlawful refusal to bargain does not preclude the union from seeking a bargaining order after the election loss.

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(1) *Texarkana Bus Co., Inc., et al.* v. *NLRB,* 119 F. 2d 480 (8 Cir., 1941), was decided prior to the 1947 amendments and did not review the Board's power to issue a bargaining order.

(2) *D. H. Holmes Co. Ltd.* v. *NLRB,* 179 F. 2d 876 (5 Cir., 1950) relies on *Franks Bros. Co., supra.*

(3) *NLRB* v. *Calderera,* 209 F. 2d 265 (8 Cir., 1954), relies on *Texarkana Bus, supra.*

(4) *Summit Mining Corp.* v. *NLRB,* 260 F. 2d 894 (3 Cir., 1958) relies on *Texarkana, supra, D. H. Holmes Co., Ltd., supra, and Calderera, supra.*

(5) *NLRB* v. *Epstein,* 203 F. 2d 482 (3 Cir., 1953), relies on *Joy Silk Mills, supra,* and another decision which itself relied on *Joy Silk Mills, supra.*

In the instant case, the Board, in arriving at its decision, relied upon *Bernel Foam, supra.* Petitioner submits that *Bernel Foam, supra,* resting as it does on the authority of *Joy Silk Mills, supra,* and *Franks Bros. Co., supra* is not controlling, as those decisions "lack persuasive impact", having been decided "without reference to the current statutory provisions." [57]

Obviously, neither *Franks Bros. Co., supra,* nor the other pre-1947 decisions are apposite here for they were decided before the Taft-Hartley amendments establishing the pre-eminence of employee voting choice as determinative of union representation.

Nor can the Board claim its expertise and administrative discretion deprive this Court of power to review

[57] *Logan Packing Co., supra,* 66 LRRM at 2602.

its conclusion that a bargaining order is the only remedy for Petitioner's unfair labor practice. Since administrative discretion is limited to the precise statutory language by which Congress empowered the agency to act, the remedy deemed appropriate must be consistent with the statutory policy; and this Court is empowered to keep the Board's remedy within that policy.

Any Board argument to the contrary must be rejected on the basis of the recent Supreme Court decision in *NLRB* v. *Brown*, 380 U.S. 278, 85 S. Ct. 980 (1965) affirming the Tenth Circuit's refusal to enforce a Board order. The Board argued that its "decision is within the area of its expert judgment" and the Court of Appeals therefore "exceeded the authorized scope of judicial review." The Supreme Court answered as follows:

> "Reviewing courts are not obliged to stand aside, and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of

major policy decisions properly made by Congress'." (Citations omitted) (at 291)

The language of the Court could not be more in point, and the compelling requirements of the statutory policy require the same result herein: rejection of the Board bargaining order.